

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

UNITED STATES OF AMERICA,)	
)	
Plaintiff,)	
)	
v.)	No. 4:07 CR 582 RWS
)	DDN
RALPH ANTHONY KNOX,)	
)	
Defendant.)	

**ORDER AND RECOMMENDATION
OF UNITED STATES MAGISTRATE JUDGE**

This action is before the Court upon the motion of defendant Ralph Anthony Knox (Doc. 171, filed July 21, 2008) to discharge counsel. This motion was referred to the undersigned United States Magistrate Judge pursuant to 28 U.S.C. § 636(b). A hearing was held on August 1, 2008. The August 1 hearing presented another issue that the undersigned believes should be taken up by the court, i.e., the question of whether defendant Knox should be allowed to withdraw his guilty plea.

At the August 1, 2008 hearing, with defendant Knox and his current counsel Eric Butts present, the court considered the pending motion which was personally handwritten by defendant Knox. In the motion defendant takes issue with certain statements made to him by attorney Butts, i.e., that defendant could be charged with conspiracy in this case, if defendant withdrew his guilty plea and continued to prosecute his allegations of conflict of interest on the part of prior defense attorney John Lynch. Defendant asked for an opportunity to have attorney Charles James in whom defendant stated he had faith represent him. At the hearing, attorney Butts provided credible support for the reasonable advice he gave to defendant on these matters. The undersigned determined and so advised defendant at the hearing that any allegation by him that attorney Lynch previously represented him under a conflict of interest was no longer relevant to this criminal action, because attorney Lynch had been replaced by appointed attorney Butts. At the hearing defendant Knox expressed his lack of confidence in attorney Butts. Nevertheless, attorney Butts stated that he felt he could continue to provide advice

to defendant Knox in future proceedings in this case, including the sentencing.

The record of the representation of defendant Ralph Anthony Knox provides information that indicates the proper outcome for the pending motion of defendant to discharge his current counsel. On September 11, 2007, following defendant's oral statements at the initial appearance before Magistrate Judge Terry I. Adelman, Judge Adelman appointed the Federal Public Defender for this district to represent Knox. On September 13, 2007, private attorney Travis Noble entered his appearance as counsel retained to represent Knox.

On October 3, 2007, defendant Knox was charged in a one count indictment with unlawfully possessing pseudoephedrine in violation of 21 U.S.C. § 841(c)(1); the maximum statutory punishments upon conviction carried a term of imprisonment of not more than 20 years. The court is advised that the citation to § 841(c)(1) qualified defendant under the facts for sentencing as a career offender.

On October 9, 2007, following the detention hearing and the return of the indictment against Knox, attorney Noble moved to withdraw from representing defendant. On October 10, the undersigned sustained the motion and reappointed the Federal Public Defender. On October 17, the court issued a detention order for defendant Knox.

On October 19, due to a conflict of interests with other clients of the Federal Public Defender's office, that office moved for leave to withdraw and for the appointment of substitute counsel. This motion was sustained and on October 22, attorney John Lynch was appointed to represent defendant. Thereafter, by faxed letter dated October 23, 2007, attorney Lynch requested the disclosure of information by the government. On November 2, attorney Lynch moved for additional time in which to file pretrial motions, which motion was sustained by the undersigned on November 5. On November 7, 2007 attorney Lynch filed motions to suppress evidence and for disclosure of a confidential informant, and requested the issuance of eight subpoenas; the court issued the subpoenas.

On November 13, 2007, with the advice of attorney Lynch, defendant personally and voluntarily withdrew his pretrial motions and waived his

right to file pretrial motions. The case was then set for a jury trial on January 7, 2008.

On December 13, 2007, a superseding indictment was filed charging two defendants in addition to defendant Knox. The new indictment continued to charge defendant Knox with one count of unlawfully possessing pseudoephedrine, but under 21 U.S.C. § 841(c)(2); the maximum statutory punishments included imprisonment for not more than 20 years. Following the arraignment on the new indictment, on December 21, 2007, attorney John Lynch again requested the disclosure of information by the government.

On January 5 and on January 23, 2008, defendant Knox, with the advice of attorney Lynch, again waived his right to file pretrial motions. On February 20, 2008, the court set the case for a jury trial on April 7, 2008.

On March 31, 2008, attorney Lynch filed a motion to continue the trial setting to consider a plea agreement offer submitted by the government. This motion was supported by a documentary Speedy Trial Act waiver signed by defendant Knox and attorney Lynch. The court set May 8 for a change of plea by defendant Knox. On May 8, 2008, defendant Lynch entered a plea of guilty to the one count. The plea agreement, which defendant Knox signed, included information indicating that the plea under § 841(c)(2) would not result in a "career offender" status for defendant and he would qualify for a substantially lower sentencing guideline range.

On June 5, attorney Lynch moved to withdraw from representing defendant Knox. A hearing was held on the motion on June 16, 2008. At the hearing Mr. Lynch stated his position which contradicted statements set forth in a pro se letter from defendant Knox to the court a copy of which was provided to Mr. Lynch, including a conflict of interest that defendant perceived. Mr. Lynch also advised the court that other clients of Mr. Lynch who were also imprisoned in the same jail as was defendant Knox told Lynch that Knox was endeavoring to provide to them improper legal advice. At this hearing, the Assistant United States Attorney also stated her understanding of the extensive actions and negotiations that Mr. Lynch took and participated in on behalf of defendant Knox. At this

hearing, defendant Knox stated under oath his understanding about facts he put into his letter to the court, including his perceived conflict of interest. Finally, at this hearing the undersigned advised defendant Knox that the record did not support a finding that Mr. Lynch represented him under a conflict of interest. Further, the undersigned advised defendant Knox that, although the court would sustain Mr. Lynch's motion for leave to withdraw and would appoint replacement counsel, if defendant was unable to get along with the newly appointed counsel, defendant may have to appear before the district judge for sentencing without counsel.

Later on June 16, 2008, the undersigned sustained Mr. Lynch's motion, allowed him to withdraw from representing Knox, and appointed attorney Eric Butts to represent defendant Knox under the Criminal Justice Act. The primary reason for granting the motion was the court's determination that defendant Knox had severed the proper attorney-client relationship between himself and attorney Lynch.

By handwritten letter to the court dated June 17, 2008, defendant Knox stated matters relating to the same earlier perceived conflict of interest involving attorney Lynch that had been taken up in court the day before. (Doc. 159.) By handwritten letter to the court dated June 19, Knox again discussed the perceived conflict of interest and other matters. (Doc. 161.) By handwritten letter to the court dated June 28, 2008, defendant Knox again discussed the status of his case and issues he perceived with the prosecutor and the proffer of information to the government. In this letter defendant stated he did not know whether his guilty plea had been withdrawn or only his "plea offer." (Doc. 164.)

On July 1, 2008, the court conducted a status conference with counsel for all parties, including appointed attorney Eric Butts, and including defendant Knox. At the hearing the undersigned indicated to defendant Knox that the court had reviewed the several recent letters Knox had written directly to the court, including those dated June 17, June 19, and June 28. At the hearing the undersigned specifically advised defendant Knox that these letters appeared to the court to relate to the earlier perceived conflict of interest which the court believed was no longer relevant to the pending proceedings in this case. The undersigned advised defendant that he should communicate with the court

only through his counsel and that he should focus his interest in working with his attorney regarding the pending sentencing proceeding. Mr. Butts stated that his and Mr. Knox's understandings were similar to the court's.

By handwritten letter to the court dated July 18, 2008, defendant Knox made statements about the representation of Mr. Butts and requested new counsel and suggested a specific attorney named "Charlie James." The letter also referred to a statement by Mr. Butts to defendant that defendant could be charged by conspiracy if defendant "pursue[d] the hearing of conflict of interest & withdrew my plea offer on 7-1-08." (Doc. 171.) The court considered this document a motion for new counsel and it was referred to the undersigned.

On August 1, 2008, the hearing described above was held. At the hearing no privately retained counsel appeared for defendant. Attorney Butts stated his positions regarding the statements made in the July 18 letter. Again, a record was made which indicated that attorney John Lynch did not previously represent Knox under a conflict of interest. Mr. Butts stated that, aside from the defendant's letters, defendant Knox indicated at the last hearing that he was in agreement with Mr. Butts's understanding of the case. Defendant Knox said his family might be able to retain Mr. James to represent him in this case. The undersigned advised defendant that Mr. James could indeed move for leave to enter the case to represent defendant. Further, the undersigned reminded defendant Knox that, because Mr. Lynch was no longer in the case, Knox's legal representation was no longer burdened by a perceived conflict of interest, and that the many attorneys who had represented Knox in this case, and now Mr. Butts, had been and were familiar with his case. The undersigned advised defendant Knox that the court would not appoint new counsel to represent him in this case. The court advised defendant that he could allow Mr. Butts to properly represent him at the sentencing or defendant could speak on his own behalf. During the course of the hearing, defendant stated that he had signed the plea agreement under duress due to statements made to him by attorney Lynch.

Following the August 1 hearing, the undersigned was made aware of another handwritten letter defendant Knox addressed to the court, dated

July 7, 2008, Document 175 (entered into the minutes August 4, 2008). In that letter defendant stated a general objection to his presentence investigation report. He states generally that both attorney Lynch and attorney Butts rendered ineffective assistance of counsel and that he would object to the report until he has a chance to review the report with "effective counsel."

DISCUSSION

The record presents the court with two important issues. The first is whether defendant has waived or forfeited his constitutional right to be represented by new, appointed counsel. The second issue is whether the court should consider allowing defendant Knox to withdraw his plea of guilty.

On the first issue, the undersigned concludes that defendant Knox has forfeited his right to have new counsel appointed to represent him. Early in the case, retained counsel entered the case on his behalf and then was allowed to withdraw. Since then defendant has been represented by three appointed attorneys. Defendant sought to have the last two replaced because of a perceived conflict of interest on the part of attorney Lynch, his counsel when he entered his plea of guilty in this case. The undersigned concludes from the record that Mr. Lynch did not represent defendant under a conflict of interest. Nevertheless, in an abundance of caution, the undersigned allowed Mr. Lynch to withdraw and appointed Mr. Butts to represent defendant Knox. Now, defendant asserts unfounded reasons for replacing Mr. Butts. The undersigned finds that, if the court replaces Mr. Butts with a fourth appointed attorney in the case, it is very likely that defendant Knox would thereafter move for the replacement of that attorney.

Defendant was advised in the various hearings that his actions could result in the loss of representation by counsel and that he would thus lose legal advice that was based on an understanding of the proceedings and their history.

In United States v. Thomas, 357 F.3d 357 (3rd Cir. 2004), a drug trafficking case, defendant Thomas was represented by retained counsel at the post-arrest detention hearing. Retained counsel was allowed to

withdraw from the case due to non-payment of fee; defendant opposed the motion but nevertheless questioned counsel's ability. The Public Defender was appointed and thereafter filed several motions on defendant's behalf. The PD thereafter moved for leave to withdraw because of a breakdown of communications with her client and because she no longer had the trust and confidence of defendant. The motion was granted and a third attorney was appointed to represent defendant Thomas. Thereafter, defendant's third attorney, and his second appointed counsel, moved for leave to withdraw over a breakdown of communications. After a hearing at which the court admonished the defendant about the ethical and practical limitations of counsel, defendant's unreasonable expectations of counsel, and defendant's refusal to cooperate with counsel. The court then appointed another attorney and advised defendant that his actions could be considered misconduct which waived the right to counsel and defendant could be forced to proceed without counsel. Following at least two stormy conferences of the attorney with defendant, counsel moved for leave to withdraw which defendant did not object to. The district court granted the motion. In doing so, it found that defendant had forfeited or waived his constitutional right to counsel. Thereafter, the court appointed new, standby counsel. Thereafter, defendant moved to remove standby counsel; the motion was denied. The case proceeded to a jury trial and defendant Thomas was convicted. Id. at 359-62.

On appeal, the Third Circuit discussed the issue of waiver and forfeiture of counsel:

As the District Court properly noted, forfeiture and waiver are separate, distinct concepts. Waiver involves the intentional and voluntary relinquishment of a known right. Waiver of the right to counsel must be knowing, voluntary and intelligent. It is clear from the Supreme Court's decision in *Faretta v. California*, 422 U.S. 806, 835 (1975), and this court's decision in *United States v. Welty*, 674 F.2d 185, 188 (3d Cir.1982), that the district court must undertake an affirmative on-the-record colloquy to explain to the defendant the possibility of waiver and give the defendant an awareness of the dangers and disadvantages inherent in defending oneself. A defendant's waiver of counsel can be deemed effective only where the district court judge has made a

searching inquiry sufficient to satisfy him that the defendant's waiver was understanding and voluntary.

Although waiver most commonly is effected by an "affirmative, verbal request" to proceed pro se, waiver also may be effected by conduct. If the district court has warned the defendant that he will lose his attorney if he engages in dilatory misconduct, "any misconduct thereafter may be treated as an implied request to proceed pro se and, thus, as a waiver of the right to counsel."

By contrast, "forfeiture results in the loss of a right regardless of the defendant's knowledge thereof and irrespective of whether the defendant intended to relinquish the right." A court may find that a defendant has forfeited his or her right to counsel after having engaged in "extremely dilatory conduct" or "extremely serious misconduct." Forfeiture can be found regardless of whether the defendant has been warned about engaging in misconduct, and regardless of whether the defendant has been advised of the risks of proceeding pro se.

357 F.3d at 362-63 (internal citations omitted). The court concluded from the contested evidentiary record that the district court properly found that Thomas forfeited his right to counsel. Id. at 363.

The Third Circuit also concluded that the district court properly found that defendant had waived his right to counsel by his unreasonable demands and conduct toward counsel, in spite of defendant's protestation that he continually asserted a desire for counsel. Id. After a review of the record and the district court's colloquies with defendant at the hearings, the appellate court concluded that the district court properly found that defendant understood the concept of waiver by conduct and that defendant's waiver was valid. Id. at 364-65.

In United States v. Irorere, 228 F.3d 816 (7th Cir. 2000), under circumstances that involved the appointment and withdrawal of several defense counsel, the Court of Appeals affirmed the district court's refusal to appoint new counsel at sentencing. The appellate court considered the issue of whether defendant waived his constitutional right to counsel by his actions and concluded that his lack of counsel at sentencing was caused by defendant's refusal to cooperate with counsel. 228 F.3d at 828.

The undersigned believes that, in the face of the court's determination that Mr. Lynch did not provide him advice under a conflict of interest, defendant Knox has intentionally continued to obstruct the progress of the case by continued unreasonable and unfounded objections to appointed counsel. By his own actions and his failure to cooperate with Mr. Butts, defendant has forfeited his right to have new counsel appointed to represent him. The record indicates that Mr. Butts has indicated that he can still communicate legal advice to defendant Knox and the undersigned believes that Mr. Butts should be kept in the case to provide legal advice and representation to defendant Knox to the degree that Knox avails himself of that service. However, to the extent that defendant does not avail himself of such services, the court should require that defendant represent himself in further proceedings.

That said, also before the court is the issue of whether defendant should be allowed to withdraw his guilty plea, which was entered in the case on May 8, 2008. (Doc. 151.) A presentence report has been prepared and reviewed by the prosecutor and by the defendant. Following the guilty plea, as set forth above, defendant has stated in his correspondence of July 18, 2008, and during the August 1 hearing, his desire to withdraw the plea of guilty.

A defendant may be allowed to withdraw his guilty plea before sentencing, if "the defendant can show a fair and just reason for requesting the withdrawal." See Fed. R. Crim. P. 11(d)(2)(B). The court should be liberal in determining whether to allow the defendant to withdraw the plea; however, there is no automatic right to withdraw the guilty plea. United States v. Gray, 528 F.3d 1099, 1102 (8th Cir. 2008). The primary issue on withdrawal or not is whether the plea was knowingly and voluntarily made. Id.

In this case, defendant has stated that he was forced to sign the guilty plea agreement because of improper information provided to him by attorney Lynch. The undersigned has determined that attorney Lynch did not act under a conflict of interest when he represented defendant during the plea proceedings.

However, before proceeding to sentencing, the court should hold a hearing on defendant's allegation that he was forced to plead guilty.

Therefore,

IT IS HEREBY ORDERED that the motion of defendant Knox for the replacement of attorney Butts is denied. However, subject to further order, defendant Knox shall either allow attorney Butts to represent him in these proceedings or he shall represent himself directly in the proceedings before the court, including the sentencing proceeding. Appointed attorney Eric Butts shall remain appointed for defendant Knox as standby counsel under the Criminal Justice Act.

IT IS HEREBY RECOMMENDED that the court conduct a hearing on defendant Ralph Knox's oral allegations that he was forced to accept the plea agreement.

The parties are advised they have ten days to file written objections to this Order and Recommendation. The failure to file timely written objections will waive the right to appeal issues of fact.

/S/ David D. Noce
UNITED STATES MAGISTRATE JUDGE

Signed on August 7, 2008.